Pottsville Bleaching and Dyeing Company *and* Teamsters Union Local No. 115 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Cases 4–CA–17211, 4–CA–17211–2, and 4–RC–15816

May 31, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 26, 1990, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We affirm the judge's finding that Supervisor Hossler's statement to employee Thomas violated Section 8(a)(1). The relevant facts are as follows. Sometime in March 1988, Supervisor Hossler approached Thomas, a part-time employee, at work and asked whether he had any questions about the Respondent's pamphlet concerning the Union. Thomas asked Hossler about benefits and working hours for part-time employees. He specifically asked Hossler why Griesbaum, a fellow part-time employee, was out of work. After Hossler told Thomas the decision was made by the supervisor on the finishing floor, Thomas stated, ''I get the impression Mike is out of work because he is a Union sympathizer.'' Hossler responded, ''To tell you the truth, that is the impression I get.''

The complaint alleges that ''[i]n or about early March 1988, a more precise date being presently unknown to the General Counsel, the Respondent, acting through Bill Hossler, at the Port Carbon plant, threatened to decrease the working hours of employees who supported the Union.'' Record evidence indicates that at hearing, prior to the General Counsel's examination of Thomas on this matter and following Thomas' statement that he asked Hossler about Griesbaum's being out of work, an exchange took place between the General Counsel and the Respondent wherein the Respondent objected to testimony on ''this subject'' because ''it was the subject of an unfair labor practice charge which was dismissed by the General Counsel.''[2] In response, the General Counsel stated that, ''it [was] not alleged as a violation'' and ''it is merely to show the completion of the conversation. This was brought up during the conversation.'' The judge overruled the objection and subsequently the Respondent cross-examined Thomas and indeed elicited testimony from its witness, Hossler, concerning the conversation with Hossler.

Although the Respondent in essence contends in its exceptions that it did not have sufficient notice of any alleged violation due to the General Counsel's representations at the hearing, we conclude that the judge appropriately found that the Respondent violated Section 8(a)(1) by engaging in the conduct set forth above. In this regard, we note initially that the complaint allegation provided the Respondent with notice of an alleged violation concerning a threat made by Supervisor Hossler to decrease the working hours of employees who supported the Union. In addition, we note that the point of the colloquy between the General Counsel and the Respondent at the hearing is simply unclear. In light of the ambiguous nature of this exchange, we are not satisfied that the General Counsel indicated that she did not intend to pursue a matter which is clearly alleged in the complaint as a violation. In these circumstances we think it was incumbent on the Respondent's counsel to seek clarification at the hearing of just what the General Counsel meant when

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's statement that it conceded that, per its policy, employee Sullivan, when he was assigned unloading work on January 29, 1988—a task not part of his ordinary job duties—had a choice of either performing the task or going home without incurring any discipline. In this regard, we note that, although record evidence establishes the accuracy of the judge's finding that the Respondent did indeed maintain the above-described policy, record evidence does not establish that the Respondent conceded this to be the case. Therefore, in adopting the judge's finding that employee Sullivan was unlawfully discharged, we do not rely on the judge's finding that the Respondent conceded maintaining such a policy.

Member Oviatt observes that if a contrary policy existed and was applicable, it was not clearly communicated to Sullivan immediately preceding his refusal to do the unloading job. Thus, Member Oviatt would find that responsibility for an employee's misunderstanding lies with the Respondent.

Member Cracraft dissents from her colleagues' finding that Supervisor Hossler's statement to Thomas violated Sec. 8(a)(1). At the hearing, the Respondent objected when the General Counsel elicited testimony regarding the Thomas/Hossler conversation. The basis for the objection was that the testimony covered a matter which had been the subject of a dismissed unfair labor practice charge. The General Counsel responded that the testimony was not being offered in support of an alleged violation, but was being offered merely to show ''the completion of the conversation.'' On being questioned by the judge, the General Counsel reiterated that the testimony was offered for background purposes only. In light of these representations by the General Counsel, Member Cracraft finds that the judge erred in proceeding to consider the testimony as evidence of a violation. Although the Respondent cross-examined Thomas and questioned Hossler regarding the conversation, the Respondent did not have sufficient notice of any alleged violation due to the General Counsel's representations. See, e.g., *Eltec Corp*., 286 NLRB 890, 897 (1987) (General Counsel's disavowal of intent to litigate specific allegations grounds for reversing judge's finding of violations on that basis), enfd. 870 F.2d 1112 (6th Cir. 1989). See generally *Redway Carriers*, 274 NLRB 1359, 1369–1370 (1985) (alleged unlawful assistance of UTA not fairly litigated due to General Counsel's untimely notice). In these circumstances, Member Cracraft would find that due-process requirements have not been satisfied.

[2] There is no further description of what that charge involved.

she stated that ''[i]t'' was not alleged as a violation. This the Respondent's counsel did not do. We further note that the Respondent's claim that it did not have adequate notice of an alleged violation is belied by its conduct at the hearing in both cross-examination Thomas and interrogating its witness, Hossler, concerning his conversation with Thomas. Finally, we find that cases relied on by our dissenting colleague, *Eltec Corp*., 286 NLRB 890, 897 (1987), enfd. 870 F.2d 1112 (6th Cir. 1989), and *Redway Carriers*, 274 NLRB 1359, 1369–1370 (1985), in apposite as these cases, unlike the instant case, involve, respectively, either a clear disavowal on the part of the General Counsel of intent to litigate a particular matter not alleged in a complaint or untimely notice of the General Counsel's intent to litigate a particular allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pottsville Bleaching and Dyeing Company, Port Carbon, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on April 22 and 23, 1988, in Case 4–RC–15816 is set aside and that this case is severed and remanded to the Regional Director for Region 4 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

Margarita Navarro-Rivera, Esq., for the General Counsel.
Stephen V. Yarnell, Esq. and *Barry R. Elson, Esq. (Cohen, Shapiro, Polisher, Shiekman & Cohen)*, of Philadelphia, Pennsylvania, for the Respondent.
Norton H. Brainard III, Esq., of Philadelphia, Pennsylvania, for the Union.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried on May 3, 4, and 5 and June 20, 1989, in Pottsville, Pennsylvania, based on a consolidated complaint in Cases 4–CA–17211 and 4–CA–17211–2, dated December 30, 1988. The charges were filed by Teamsters Union Local No. 115 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Teamsters Local 115). The consolidated complaint alleges, in substance, that the Respondent, Pottsville Bleaching and Dyeing Company (Pottsville Bleaching), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by threatening and coercing its employees and by discharging Joseph Z. Sullivan because of his union activities.

The Union's objections, filed on April 29, 1988, to conduct affecting the result of the election held on April 23 1988, in Case 4–RC–15816, were consolidated by an order, dated March 17, 1989, with the unfair labor practice complaints, because they present common issues of fact.

The Respondent's answer to the consolidated complaint admitted the jurisdictional allegations in the complaint and denied that the Company had engaged in unfair labor practices.

Pursuant to a motion by the General Counsel, the consolidated complaints were amended to include an allegation of violation of Section 8(a)(1) of the Act for the Respondent's failure to give certain assurances to employees during interviews conducted by the Respondent's attorney.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs[2] filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Pottsville Bleaching and Dyeing Company, is a Pennsylvania corporation engaged in the bleaching and dyeing of tubular fabrics at its plant in Port Carbon, Pennsylvania. With revenues in excess of $50,000 for services performed on the goods of customers located outside the State of Pennsylvania, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Its approximately 195 production and maintenance employees are supervised by a hierarchy of managers and supervisors, including, Charles J. McBennett, plant manager; Richard Underwood, finishing department manager; Gary O'Hara, employee relations manager; as well as Supervisors Robert Petrozino, Eugene Kalyan, James Walsh, John Novak, and William Hossler. John Lewis Miller Jr., the chairman of the board and president of the Miller Group, a holding company for Pottsville Bleaching and Dyeing, testified as the chief executive of the Respondent.

The Union, Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Teamsters Local 115 has attempted to organize the Company's production and maintenance employees on at least five prior occasions. The most recent election was held on April 22 and 23, 1988, pursuant to a Stipulated Election Agreement of April 1, 1988, resulting from a petition filed on January 16, 1985, in Case 4–RC–15816.[3] With a tally of votes of 123 to 66 against the Union, the 7 challenged ballots were held insufficient to affect the outcome of the election. However, the Union filed objections to conduct affecting the results of the election. Two of the objections were consolidated for hearing with the allegations in the unfair

[1] The unopposed motion by the General Counsel to correct the transcript is granted.

[2] The briefs were thorough and well written.

[3] The election held on March 8, 1985, in that case was voided because of an unfair labor practice case against Pottsville Bleaching that ultimately resulted in an order to cease and desist. *Pottsville Bleaching Co*., 277 NLRB 988 (1985).

labor practice complaints on the basis that they presented common issues of fact (G.C. Exh. 1(g)).

Joseph Sullivan, an employee at Pottsville Bleaching since August 1965 has actively campaigned in all the Union's repeated attempts to organize the employees. The Company discharged Sullivan in May 1984 because of his union activities. He was reinstated with backpay in September 1986 pursuant to an order of the National Labor Relations Board.[4] Thereafter, Pottsville Bleaching engaged in additional misconduct involving unfair labor practices.[5]

In 1988 Sullivan was again a conspicuous union activist and engaged in such union activities as passing out union literature and soliciting fellow employees for the Union. He regularly wore a jacket and a hat displaying union insignia. He was also on the Union's in-plant committee.

The alleged unfair labor practices in this case occurred during the latest efforts of Teamsters Local 115 to organize the employees in 1988.

A. *Alleged Threats*

The consolidated complaint alleges that Supervisors Walsh, Hossler, and Underwood threatened employees at various times prior to the union election on April 23, 1988. Employee William Powell testified about an episode in 1988 prior to the election when he was on his way to a company meeting concerning the production of bleach. He recalled that he had been wearing a union hat that day, and when he entered the doorway, Supervisor James Walsh said to him: ''I suggest that you take the Union hat off if you plan to keep your happy home'' (Tr. 295). Powell took off his hat before entering the meeting and put it back on as he left the meeting. Employee Earl Thomas testified that he overheard the conversation between Powell and Walsh and that it occurred in January or February 1988.

I credit the firm and consistent testimony of employees Powell and Thomas and find that Supervisor Walsh had made these threats despite his testimony to the contrary (Tr. 694).[6] The law is clear, Section 7 of the Act protects the rights of employees to wear union insignia while at work absent special circumstances. Supervisor Walsh not only interfered with that right but threatened the employee with adverse consequences or unspecified reprisals unless he removed his union hat. Because the record does not show that special circumstances required the supervisor's order, it is clear that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

The next allegation in the complaint concerns a statement made by Supervisor Hossler sometime in March 1988. Earl Thomas, a part-time employee at Pottsville Bleaching, testified that Hossler approached him at his work station and asked whether he had any comments about the Company's pamphlet concerning the Union. Thomas responded with a few questions about the benefits and working hours for part-time employees. He specifically questioned Hossler why Mike Griesbaum, a part-time employee, was out of work. When Hossler replied that this decision was made by the supervisor on the finishing floor, Thomas said: ''I get the impression that Mike is out of work because he is a Union sympathizer.'' Hossler said to him, ''to tell you the truth that is the impression I get.'' (Tr. 302.)

Hossler recalled this conversation in his testimony, but he stated that he said the following (Tr. 748):

> They asked me if it was true, Mike wasn't being called into work because he was a union supporter and I said I don't know anything about that.

I credit Thomas' clear and convincing testimony, particularly because his testimony, unlike that of Hossler, was given against his self-interest. In agreement with the General Counsel, I therefore find that the Respondent violated Section 8(a)(1) of the Act. A supervisor's statement to an employee that a fellow employee's union activities resulted in adverse consequences or reprisals is a threat designed to interfere with the employee's Section 7 rights.[7]

The next allegation in the complaint challenges as unlawful several statements made by the manager of the finishing department, Richard Underwood, during the conversation with Michael Griesbaum, a part-time employee in the finishing department. Griesbaum was a union activist during the organizational efforts of Teamsters Local 115. He served on the Union's in-house committee, passed out union pamphlets, solicited for the Union among his fellow employees, and wore a union hat and a union jacket.

Griesbaum testified that Underwood approached him at his work station in late August or early September. Griesbaum had talked to some of the employees and Underwood called him a troublemaker and said that he had a bad attitude. Griesbaum recalled this episode as follows (Tr. 275):

> He started right after last break at 7:00 in the morning an I was on the late shift and I guess I was talking with a bunch of employees in the cafeteria in our lunch room and right after that I was at my machine and Mr. Underwood came down and he was upset about me talking to other employees about four three shifts and I just told him it was my own opinion and let it go at that. Later on at the end of the shift it was approxi-

[4] *Pottsville Bleaching Co.*, 275 NLRB 1236 (1985), enfd. mem. 800 F.2d 1136 (3d Cir. 1986).

[5] *Pottsville Bleaching Co.*, 283 NLRB 359 (1987).

[6] Walsh testified that he did not recall any conversation with Powell or any other employee about a union hat, and that he has never spoken to any employee about the Union (Tr. 694–695). Walsh's testimony in this regard as demonstrated by his demeanor was not credible.

[7] The General Counsel's examination of Thomas as a witness was preceded by the following exchange (Tr. 301):

> Q. Did you say—do you recall saying anything else to Mr. Hossler?
>
> A. Yes. I asked him about Mike Griesbaum being out of work at the present time when he should have been in.
>
> Q. Did Mr. Hossler respond at all?
>
> MR. ELSON: I would object to testimony on this subject. This subject was the subject of an unfair labor practice charge which was dismissed by the General Counsel. It is not the subject of this litigation.
>
> MS. NAVARRO-RIVERA: It is not alleged as a violation Your Honor. It is merely to show the completion of the conversation. This was brought up during the conversation.
>
> MR. ELSON: This is an unfair labor practice charge dismissed.
>
> JUDGE BUSCHMANN: Is it for background purposes?
>
> MS. NAVARRO-RIVERA: Yes, Your Honor, I just want to show the actual conversation that took place.
>
> JUDGE BUSCHMANN: All right. Objection overruled.

This exchange between counsel appeared confusing and apparently relates to a charge that was dismissed by the Regional Director. The complaint, however, clearly contains an allegation of 8(a)(1) misconduct on this issue. The record shows that the Respondent interrogated his witness, Hossler, about this conversation with Thomas in March 1988. Accordingly I considered the evidence of the conversation, not only for background purposes but in support of the allegation in the complaint.

> mately 25 minutes of 11 he come down and said he wanted to see me in his office. When I got there he had told me that some of the employees that I guess were in the lunch room at that time they didn't want to be around me and he said that I had a bad attitude and that I was a trouble maker.

Sometime later, about 2 weeks before Christmas 1987, Griesbaum had another conversation with Underwood when he referred again to Griesbaum's attitude. Griesbaum described this incident as follows (Tr. 276):

> I guess it was about two weeks before Christmas in '87. I had kind of clammed up because I really didn't trust too many people around me so I just talked to close friends and stuff like that and I got called into the office. It was near the end of the shift again it was around 20 of 11 I was working late shift and he had said that he had seen a change in my attitude and he had discussed possible job openings on the down dryer like after Christmas sometime and he wanted to know if my attitude was going to stay the same and I just told him that personally I didn't think it was my attitude at all.

Griesbaum told Underwood during that conversation that he got involved with the Union because he felt that his rights were abused and because he could not obtain full-time work with the Respondent.

About February 2, 1988, Griesbaum learned that employees with less seniority than he were working while he was laid off. He testified that he went to the finishing department and requested a grievance form. John Novak, second-shift supervisor, told him to call Underwood. When Underwood appeared, he immediately asked Griesbaum ''what is your beef now'' (Tr. 278). When Griesbaum explained that he should have been called in to work because he had more seniority than other employees who were working, Underwood replied that ''he could put whoever he wanted in there.'' Griesbaum finally requested a grievance form and a claim sheet. Underwood however refused to provide him with the forms that, according to Respondent's handbook, must be provided a supervisor (G.C. Exh. 2).

Underwood's testimony about these conversations dealt mainly with his opinion of Griesbaum's poor attitude towards his job. Underwood did not recall whether he refused to provide Griesbaum with the grievance forms, but conceded that he knew about Griesbaum's union involvement.

The General Counsel argues that the Respondent violated Section 8(a)(1) of the Act by referring to Griesbaum as a troublemaker because such a reference is usually designed to intimidate union activists. The General Counsel also regards Underwood's comment violative of the Act when he promised Griesbaum full-time work if his attitude would ''stay the way it was.'' The General Counsel further argues that Respondent's refusal to provide Griesbaum with the grievance forms constitutes a violation of Section 8(a)(1) of the Act, as a form of coercion resulting from his union activity.

To be sure, Underwood's reference to Griesbaum as a troublemaker was also directed at his conversations with the employees about the ''4/3 shift.'' As Underwood testified, ''there was a few of the weekend employees who were a little irritated that they thought the company was going to install a 4/3 shift, which would in fact eliminate weekend employees and you know they were upset'' (Tr. 790). However, the record shows that Griesbaum's union activity included ''talking to people all the time constantly'' (Tr. 274). Underwood had observed Griesbaum's changed attitude prior to Christmas 1987 because he ''had kind of clammed up'' and talked only to close friends. Underwood discussed possible job openings if Griesbaum's ''attitude was going to stay the same'' (Tr. 276).

The term ''troublemaker'' has an established meaning in connection with employees' union or concerted activities; equating an employee who engaged in union activities with being a troublemaker constitutes a violation of Section 8(a)(1) of the Act. *Monfort of Colorado*, 298 NLRB 73 (1990); *Champion Road Machinery*, 264 NLRB 927, 929 (1982); *Perth Amboy Hospital*, 279 NLRB 52 fn. 2 (1986). Moreover, the Respondent's threat that Griesbaum's attitude, namely, his union talk, precluded his consideration for full-time employment is a violation of Section 8(a)(1), as well as Underwood's refusal to provide Griesbaum with a problem-solving forum.

B. *The Discharge of Joseph Sullivan*

Following his reinstatement pursuant to a Board order, Joseph Sullivan, a prominent union activist and a 19-year veteran in Respondent's employ, was discharged on January 29, 1988, for what the Respondent characterized as gross insubordination. This was Sullivan's second discharge since his employment at the Port Carbon plant on August 16, 1965, as a tub operator in the dye house. His first discharge occurred on May 18, 1984, when the Respondent accused him of acts[8] of insubordination. The real reason for his discharge, as found by the Board and affirmed by the Third Circuit, was Sullivan's role ''as one of the most active employees'' in the union campaign. Sullivan participated in all five or six union campaigns at the plant between 1982 and 1988. After his reinstatement in September 1986, he worked in the finishing department under the supervision of Eugene Kalyan. He continued his union activity, and as ''a member of the in plant committee [he] solicited and signed up employees for the Union, handed out literature outside the plant, talked to employees concerning the Union'' (Tr. 63). He regularly wore a jacket and a hat with union insignia until his discharge. He was observed by members of management as he passed out union literature and was regarded by management as a union activist (Tr. 63–67).

Shortly after 10 a.m. on January 29, 1988, while Sullivan was working at his machine, supervisory trainee, Robert Petrozino, told Sullivan and other employees that the machines were going to shut down, and that they should clean up around the machines. Shortly thereafter Kalyan appeared and instructed Sullivan and other employees to go out and unload trucks.[9] Several employees complied, one went to the bathroom, and Sullivan replied that he did not want to go out to unload trucks because it was too cold at the loading dock. At that point Kalyan said, ''either do the job or go the fuck home'' (Tr. 68). Sullivan then demanded a grievance form,

[8] *Pottsville Bleaching Co.*, 275 NLRB 1236 (1985), enfd. mem. 800 F.2d 1136 (1986).

[9] It is possible, the record is not clear on this point, that Petrozino may have told the employees that Kalyan had changed his mind and wanted them to unload the trucks.

and Kalyan told him again ''go the fuck home.'' Sullivan finally obtained a grievance form from Supervisor Underwood; completed it and handed it to Kalyan. Kalyan told him again to get out and Sullivan left the plant about 11 a.m. after punching out.[10] Sullivan contacted the office in the afternoon and spoke to Underwood who told him not to return to work until he was called. On February 1, 1988, Gary O'Hara, Respondent's employee relations manager, requested Sullivan to report to the office of Charles McBennett, the plant manager, on the following day. During that meeting, Sullivan was asked about his version of the incident and was informed that the Company would investigate the matter further. On February 3, 1988, O'Hara directed Sullivan to attend a meeting about 2 p.m. attended by McBennett and O'Hara. There McBennett read from a prepared statement informing Sullivan that he was guilty of gross insubordination and that he was discharged (Tr. 74). Sullivan, expressing his incredulity about the Company's decision, stated that he intended to file a grievance pursuant to the fourth step of the Company's grievance procedure known as the 4/3 committee or the problem-solving committee. The committee, comprising three employees and four representatives of management, met on February 19. Sullivan conceded at the meeting that he refused to follow his supervisor's instructions, but he explained that he had a cold and did not want to be exposed to the severe cold in the dock area. He also said that other employees who received similar instructions and failed to abide by them were not discharged. Nevertheless, by a vote of four to three the committee upheld the discharge.

The General Counsel submits that Respondent's proven hostility towards the union activists[11] resulted in Sullivan's discharge and that Sullivan, in the absence of his union activity, would not have lost his job because he refused to perform the assigned work.

The Respondent argues that since the last proceeding involving Sullivan, it hired new counsel and a human relations professional to assure that no actions would be taken against employees because of their union activities and that many union activists were promoted to management positions showing that the Company harbors no union animus. Sullivan, according to the Respondent, was discharged because of gross insubordination and a direct violation of its published plant rules.

A fair evaluation of the record evidence, however, shows that Joseph Sullivan was once again discharged because of his union activity. The Company used Sullivan's refusal to do the assigned task as a pretext in a blatant display of disparate treatment to rid itself of this employee. There is no dispute that Sullivan, when told by Supervisor Kalyan to unload the truck, responded that he did not want to unload the truck because it was too cold there and that he refused to follow those instructions. There is also no dispute that the Company's employee handbook lists ''gross insubordination'' as one of the incidents that ''alone may result in an immediate discharge situation'' (G.C. Exh. 2). By letter of February 5, 1988, Sullivan was informed as follows (G.C. Exh. 5):

> By your unprovoked conduct toward supervision, when you refused direct verbal orders, you committed acts of gross insubordination. Your actions were in violation of published and posted plant work rules, of which you are familiar. Specifically, the work rule on gross insubordination, which has been defined by example as ''refusal to obey orders, either verbal or written.'' Consequently, the company has no other alternative but to terminate you from Pottsville Bleaching and Dyeing Company, effective January 29, 1988.

However, contrary to the statements in that letter, the record shows that the Company did have other alternatives and in fact used such alternatives in prior incidents of insubordination involving other employees. The record contains representative examples of numerous incidents of gross insubordination committed by other employees, yet the Respondent had to concede that between 1984, the first time Sullivan was discharged for insubordination, and his second discharge in 1988, no other employee was fired for gross insubordination (Tr. 460). Only one other discharge for gross insubordination occurred in all these years and it happened after Sullivan's discharge in 1988. Employee David Rubright was fired in August 1988 for an act of insubordination, but only after he had received a final warning and was already on 1-year probation for other offenses. Sullivan, was summarily discharged without such prior disciplinary record. The record also contains a letter, dated April 22, 1987, from Pottsville Bleaching to Donald Unger, an employee, which details certain misconduct including being ''disruptive, disrespectful, insubordinate, and generally hostile toward . . . supervisor, Bill Hossler'' (G.C. Exh. 16). Not only was Unger insubordinate but he also engaged in yelling obscenities at a female employee (G.C. Exh. 15). Unger, unlike Sullivan, merely received a warning. The Respondent argues that the Company took Unger's emotional problem into consideration as a mitigating circumstance. However, the record shows that Unger had mental problems sometime ago in 1979. In any case, Unger was not discharged for an extreme outburst and insubordinate demeanor. He was also not discharged for his direct refusal to follow the orders of his supervisor, Hossler, in January 1988 when he was instructed ''to go turn.'' His supervisor simply told him to go home. was back at his job on the following day (Tr. 249–250).

In its brief, the Respondent has attempted to distinguish on narrow grounds incidents of insubordinate, disrespectful, and openly defiant conduct by other employees, suggesting that the particular employee either admitted his wrongdoing, apologized for it, or had a good reason for the insubordination. According to the Respondent, an employee may be justified in disregarding a supervisor's order when his own machine was still in operation, or if he had more seniority than another employee who could perform the same task. Remarkably, however, all acts of insubordination or other misconduct which often exceeded that of Sullivan's in severity, were treated with more leniency.

For example, Roy Yeager, presently an employee in the finishing department, testified that during a period of October through November 1987, he was told by Supervisor Kalyan

[10] According to the record, Kalyan had a reputation for his constant use of the obscene four-letter word. Accordingly, I do not credit his version of the episode where he attributes the use of that word to Sullivan rather than to himself, and where he claimed to have repeated his order several times.

[11] As shown in two prior cases, *Pottsville Bleaching Co.*, 275 NLRB 1236 (1985), involving the unlawful discharge of Joseph Sullivan, and *Pottsville Bleaching Co.*, 283 NLRB 359 (1987), dealing with the unlawful discharge of Ronald Downey.

''to go over and run the rolling machine.'' ''At least eight to 10 times'' Yeager simply refused, saying ''I am not going over. . . . I got work for me . . . put the youngest guy on there'' (Tr. 140). Kalyan simply walked away without disciplining Yeager. Lawrence Seaman, a truckdriver for Pottsville Bleaching, testified that in February 1988 he was angry at his supervisor, Rick Bubeck, for telling him not to report for work one day. On the following day, Seaman cursed him saying, ''fuck you,'' three times without being punished. He later apologized and was told that the Company had just fired someone, namely, Sullivan, for such conduct.

Employee Joseph Skocik testified that in December 1987 Supervisor Kalyan called him into his office and told him that he wanted him ''to do all the tieing [sic] up of bundles and everything.'' Skocik replied that it did not sound fair and that another employee who had less seniority should do that work. Kalyan simply relented without disciplining Skocik (Tr. 196–197).

The testimony of Robert Shappell deals with two instances of insubordination. He related that he argued with his supervisor, Rick Horton, about the subject of 4 hours of overtime as follows (Tr. 235):

> We were there arguing for the four hours. He gave me the option to work the four hours and I refused it and he told me when I am talking to you, shut your mouth and I told him I don't shut my mouth for no cock suckers.

His supervisor then left and when he returned, Shappell told him to ''leave me the hell alone.'' Shappell was not disciplined for this episode. Shappell also testified that he observed Supervisor Kalyan instruct employee Michael Mallo several months prior to this hearing, saying (Tr. 236): ''Go down the other end of the wrapping machine, take the cloth off the wrapping machine.'' According to Shappell, Mallo said, ''no it ain't my job.'' Yet Mallo was not disciplined and continued working at the plant. Lawrence Burns, a dryer operator, recalled in his testimony that in January 1989 Bill Hossler approached him about 4 p.m. and said ''Larry you are going to have to go wet sew . . . and . . . if you don't wet sew you are going to have to go home'' (Tr. 252–253). Burns replied that he would sew, but then he returned to his machine and told Hossler to assign another less senior employee to do the job. Again, even though Burns refused to comply with his supervisor's order, he was not disciplined and continued in his job. Robert Umbenhen is another employee at Pottsville who testified unequivocally that about 2 years ago while he was in the finishing department, Kalyan ordered him to do a certain task or go home. Umbenhen distinctly remembered that he refused to do the job and was not disciplined in any way (Tr. 324). Employee Thomas Pacine who, according to the testimony of Gary O'Hara, Respondent's employee relations manager, actually threatened the life of Supervisor Bubeck in 1986 and subsequently in 1988 again threatened Supervisor Hossler with a beating (Tr. 451–456). Employee Pacine was disciplined but not discharged for such ''serious offenses.'' Raymond Guldin, an employee, testified that in January 1988 he was working at the conveyor belt taking off bundles and weighing them, when Supervisor Kalyan ordered him to ''tie the bundles.'' Guldin told Kalyan that he should not have to do the extra work. Kalyan merely responded that if anything came back he would get a warning. Although Guldin ultimately complied with Kalyan's order, he testified that when Plant Manager McBennett appeared at the work station, Guldin told him to keep Kalyan off his back or would ''knock him on his f—ing rearend.'' McBennett simply watched the employees without taking any disciplinary action.[12]

The Respondent argues that none of these incidents compare with Sullivan's repeated insubordination, stating that ''Sullivan refused on three occasions a direct order to do work by two supervisors'' (R. Br. 30). Not only is the Respondent's description of Sullivan's misconduct exaggerated, but the Respondent also failed to explain convincingly that misconduct by other employees, such as threats of bodily harm against supervisors, sleeping on the job, obscene language directed at supervisors and employees, as well as employees' refusals to follow orders of supervisors were tolerated by the Respondent with little or no discipline. Not a single employee was fired for insubordination in the years from 1984 when Sullivan was first discharged to 1988 the year of his second discharge. The Respondent's disparate treatment is all the more apparent because Sullivan, unlike most other employees who were insubordinate, had a cold and did not want to be exposed to the cold environment at the trailer ramp. The Respondent disputes these factors arguing that Sullivan did not have a cold[13] and that, in any case, the temperature in the trailer area was not extremely cold. But the record is clear that the Respondent was simply quarreling with Sullivan's excuse. Here, unlike in other, similar circumstances, the Respondent refused to consider it as a mitigating factor.

The record is abundantly clear that Sullivan would not have been discharged for his refusal to help unload the trailer, if he had been treated like all the other employees. He might have been suspended or put on a final warning, or be entirely excused as in the case of several other employees in view of the mitigating circumstances. Indeed, the record shows that the Company maintained a policy that gave the employee an option when faced with an order to perform a task when it is not part of an employee's ordinary job assignment. He could either do the job or opt to go home without incurring any discipline.[14] Sullivan's record as one of the most active union supporters and his open and persistent union support leads to the only conclusion. He was discharged again because of his union activities. This is particularly evident from the Respondent's proven union animus, reflected in the prior cases and its violations of Section 8(a)(1) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

[12] I credit Guldin's testimony about this episode despite McBennett's denial, because Guldin was a reluctant witness and because O'Hara corroborated that such an incident occurred.

[13] The Respondent's reasons for doubting Sullivan's claim of a cold were that he would have called in sick or at least provided an immediate excuse.

[14] The Respondent conceded that such a policy existed, but made an attempt to distinguish between a job assignment while the operating machine is operating and one during a temporary shutdown of the machine. In the latter example, the employee had supposedly no choice. Only if an employee's machine was still in operation or when the employee's regular work was not available for an entire shift would such employees have the option to refuse an assignment. It is doubtful that the employees were aware of such technical distinctions.

C. *Employee Interviews*

The final allegation of unlawful conduct was included pursuant to General Counsel's motion to amend the complaint (Tr. 149). It alleged that the Respondent violated Section 8(a)(1) of the Act by conducting ''interviews of employees without assuring the employees that no reprisals would be taken against them as a result of the interviews'' (Tr. 13).

The record shows that Respondent's counsel, Barry R. Elson, conducted interviews with three employees Roy Yeager, Joseph Skocik, and Paul Sherry in March 1989. Yeager testified that Gene Kalyan told him to see Gary O'Hara. Yeager was then introduced to two attorneys, Barry Elson and Stephen Yarnell. Elson stated: ''I would like to ask you a couple of questions on Joe Sullivan's case. . . . Is it all right with you.'' (Tr. 150.) According to Yeager, Elson did not tell him that he had the right not to answer or that no reprisals would occur as a result of the interviews.

Skocik testified that Kalyan approached him about 11:50 a.m. and told him to see O'Hara. When he arrived at O'Hara's office, O'Hara said, ''these gentlemen would like to speak to you about Joe Sullivan if it is all right with you'' (Tr. 198). Skocik agreed and expressed no objection to O'Hara's presence during the interview. According to Skocik, Elson questioned Skocik about the events of January 29 without stating ''that the company would not take any disciplinary action against'' him if he chose not to answer the questions (Tr. 199).

Paul Sherry, who has worked for the Company for 21 years, similarly testified that he was asked to report to O'Hara's office by Kalyan. In addition to O'Hara, also present were the two attorneys. Elson proceeded to ask him questions about a certain letter and about Joe Sullivan. Sherry testified that Elson did not make any statements assuring him that he had a right not to answer any questions or that he would not suffer any disciplinary action if he chose not to answer any questions (Tr. 359).

The only witness to testify for the Respondent on this issue was Attorney Elson. He conceded that he questioned the three employees in preparation for the litigation and that he followed the same procedure with each employee. He outlined that procedure as follows (Tr. 732–733):

> I introduced myself by name, and my position, that I was an attorney for the company. I was not an employee of the company but a lawyer representing the company. I explained to him what it was that I was in Port Carbon for. I explained the nature of the NLRB proceeding that was pending at the time so that he would have some sense of who I was and the context in which he found me. I explained the NLRB complaint regarding Mr. Sullivan and the other allegations as well as the objections to election I told Mr. Yeager that it was perfectly acceptable that he not speak to me if he did not care to speak to me, that it was his choice. It made no different [sic] to me or the company. I also told him that all I was interested in was the truth regarding the items or matters that I might ask him about or anything he might say. That I didn't care one way or the other whether or not what he would say would help or hurt the company in its defense of the objections or of the unfair labor practice charges. That I was here to find out some facts to begin or continue preparation for the case and that that was what I was there for, and if he was willing to speak to me, he could. If he didn't care to speak to me, that was perfectly all right as well.

I do not doubt counsel's testimony to the extent that he obtained the employees' consent and indicated to them that he was interested in obtaining the truth about the Sullivan incident, but I must credit the consistent testimony of the three employees in general. Had they heard the elaborate statement that Elson claims to have made, they would have recalled at least a portion of his explanation. Unfortunately, O'Hara and Yarnell who were present during the interviews were not questioned about this incident. Accordingly I find that the Respondent interrogated the three employees in preparation for litigation without disclosing all the necessary warnings. Without certain safeguards, such interviews have long been recognized to have a coercive effect on the employees' Section 7 rights. The Respondent failed, at least in part, to impart the necessary assurances to the three employees, in violation of Section 8(a)(1) of the Act. In *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987), the Board stated as follows:

> Since *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), the Board has consistently required an employer to administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding: instruct him of ''the purpose of the questioning, assure him that no reprisal will take place, and obtain his permission on a voluntary basis.''

D. *The Objections*

The Respondent's violations of Section 8(a)(3) and (1) of the Act when it discharged Joseph Sullivan for the second time and the Respondent's misconduct under Section 8(a)(1) of the Act as it related to threats and other coercive conduct towards Michael Griesbaum during the critical preelection period, seriously interfered with the election. Considering the number of violations, their severity, the extent of discrimination, and the size of the unit, it is clear that these violations interfered with the exercise of a free and untrammeled choice in the election. This is particularly so when the Respondent's past conduct including the first discharge of Joseph Sullivan is considered. *Enola Super Thrift*, 233 NLRB 409 (1977). It is clear that Respondent's conduct warrants the setting aside of the election.

CONCLUSIONS OF LAW

1. Pottsville Bleaching and Dyeing Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By threatening employees with unspecified reprisals for wearing union insignia, the Respondent violated Section 8(a)(1) of the Act.

3. By stating that employees were out of work or would not be considered for job vacancies because of their union activities, the Respondent violated Section 8(a)(1) of the Act.

4. By referring to a union activist as a ''troublemaker'' and by refusing to provide him with a grievance form, the Respondent violated Section 8(a)(1) of the Act.

5. By interrogating employees in preparation for trial without disclosing safeguards that their answers are voluntary and that no reprisals would be taken, the Respondent violated Section 8(a)(1) of the Act.

6. By discharging Joseph Sullivan because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. Objections (2) and (3) in the notice of hearing dated December 19, 1988, in Case 4–RC–15816 as consolidated with the complaint, have been sustained as a result of the findings that presented the same issues. The objectionable conduct requires that the election conducted on 5 April 22 and 23, 1988, in Case 4–RC–15816 be set aside, because the violations found interfered with the election and prevented the holding of a fair election.

THE REMEDY

On concluding that the Respondent has engaged in certain unfair labor practices, I find it necessary to recommend that it cease and desist in any other manner therefrom[15] and take certain affirmative action necessary to effectuate the policies of the Act. Having unlawfully discharged Joseph Sullivan, the Respondent shall offer him reinstatement, and make him whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Pottsville Bleaching and Dyeing Company, Port Carbon, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in any activity on behalf of Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

(b) Threatening employees with unspecified reprisals for wearing union insignia.

(c) Stating that employees were out of work or would not be considered for job vacancies because of their union activities.

(d) Referring to union activists as ''troublemakers'' or having a bad attitude and refusing to provide grievance forms to employees because of their union support.

(e) Interrogating employees in preparation for trial without disclosing necessary safeguards including that their answers are voluntary and that there would be no reprisals.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Joseph Sullivan immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Port Carbon, Pennsylvania facility copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election held on April 22 and 23, 1988, in Case 4–RC–15816 be set aside and that it be remanded to the Regional Director for the purpose of conducting a second election.

[15] A broad order is justified in this case. *Hickmott Foods*, 242 NLRB 1357 (1979).

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in any activity on behalf of Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

WE WILL NOT threaten our employees with reprisals for wearing union insignia.

WE WILL NOT tell our employees that they are out of work or will not be considered for job vacancies because of their union activities.

WE WILL NOT refer to union activist as ''troublemakers'' or refuse to provide them with grievance forms.

WE WILL NOT interview our employees in preparation for trial without telling them certain safeguards such as that their answers are voluntary and that they will not incur any reprisals.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Joseph Sullivan immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest

WE WILL notify Joseph Sullivan that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

POTTSVILLE BLEACHING AND DYEING COMPANY